

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, D.C. 20001-2021

February 11, 2005

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of WILFREDO MORALES,	:	Docket No. SE 2005-71-DM
Petitioner	:	SE-MD 2005-01
	:	
v.	:	
	:	
ARENERO RAFAEL COLON, INC.,	:	Arenero Rafael Colon
Respondent	:	Mine ID 54-00150

## **ORDER DENYING MOTION TO DISMISS**

This matter arises under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the “Act,” and Commission Rule 45, 29 C.F.R. § 2700.45, upon the application of the Secretary of Labor to reinstate Wilfredo Morales to his former position with Arenero Rafael Colon, Inc. (Colon, Inc.), a sand extraction and processing concern located in San Lorenzo, Puerto Rico. The Secretary alleges in her application that Sr. Morales was discharged from his job as a heavy equipment operator on July 6, 2004, because he in effect complained about the unsafe condition of a haulage road.

The Secretary requests that an Order of Temporary Reinstatement be issued directing Colon, Inc. to reinstate Sr. Morales to his position at his same rate of pay and benefits and with the same, or equivalent, duties. Colon, Inc. denies the Secretary’s allegations of discrimination and requests a hearing on the application for temporary reinstatement.

The alleged discriminatory act occurred on July 6, 2004. Wilfredo Morales filed his complaint with the Secretary November 15, 2004. Section 105(c) of the Act sets a time limitation applicable to filing a complaint under the Mine Act by requiring a miner “who believes that he [or she] has been discharged, interfered with, or otherwise discriminated against in violation of this subsection” to file a complaint alleging such discrimination “within 60 days after such violation occurs.” Clearly, Sr. Morales did not comply with this provision in that his complaint was due to be filed on or before September 6, 2004. Because the complaint was late-filed, Colon, Inc. moves in effect for dismissal of the application for temporary reinstatement which is based on the untimely complaint. The Secretary opposes the motion. She argues that the 60-day time limit is not jurisdictional and that a miner’s failure to comply with it may be excused for good cause.

The Secretary is right in this regard. The Commission repeatedly has held that the 60-day time limit in Section 105(c) is not jurisdictional and that justifiable circumstances may excuse

compliance (See e.g., Hollis v. Consolidation Coal Co., 6 FMSHRC 21 (January 1984); Hermann v. INCO Services, 4 FMSHRC 2135 (December 1986)).

Moreover, the Commission and its judges have recognized a miner's ignorance of his or her Section 105(c) rights to be "good cause" justifying a late filing when the miner has filed promptly upon becoming aware of his or her rights and when the delay is not exceptional (See e.g., Daniel C. Howell v. Capital Cement Corp., 23 FMSHRC 901 (August 2001) (ALJ Bulluck)). When, as here, the Respondent does not allege it has been prejudiced by the delay, excusing the late filing is made more likely, especially if the delay is as short as that at issue here (See Secretary on behalf of Bernard Smith v. Jim Walter Resources, 21 FMSHRC 359 (March 1999) (ALJ Melick); Secretary on behalf of Franco v. W. A. Morris Sand & Gravel, Inc., 18 FMSHRC 278 February 15, 1996 (ALJ Manning)).

The affidavit Applicant's counsel submits to support his opposition to the motion states the Applicant was "not aware that there was any requirement to file a complaint with MSHA within 60 days" and that "[a]s soon as ... [he] became aware that MSHA had protections against terminating miners for the exercise of protected activity, he filed his complaint with MSHA, on November 15, 2004."

I accept counsel's affidavit as true, and I therefore find the Applicant was in fact unaware of the 60-day time limit and the Applicant filed his complaint as soon as he became aware of his section 105(c) rights. Based on these facts, and because the complaint was only 72 days late and the Respondent does not assert it was prejudiced by the delay, I conclude the Respondent's motion to dismiss should be, and hereby is, **DENIED**.

David F. Barbour  
Administrative Law Judge  
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Distribution: (Certified)

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